

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2590

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2590

MARGARET M. LANDON,
Plaintiff-Appellant,

v.

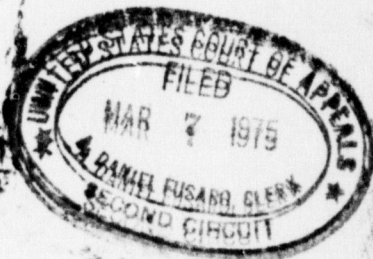
TWENTIETH CENTURY-FOX FILM
CORPORATION

and

COLUMBIA BROADCASTING SYSTEM, INC.
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF



Mitchell Rogovin
James A. Dobkin
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Herbert A. Fierst
607 Ring Building, N.W.
Washington, D. C. 20036

Robert Layton
LAYTON & SHERMAN
50 Rockefeller Plaza
New York, New York 10020

Attorneys for Appellant

B

P/S

3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2590

MARGARET M. LANDON,
Plaintiff-Appellant,

v.

TWENTIETH CENTURY-FOX FILM
CORPORATION

and

COLUMBIA BROADCASTING SYSTEM, INC.
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

I. INTRODUCTION

Appellees in their brief ^{*/} seek to trivalize the
significant issues reflected by this appeal, unfortunately
through statements substantially less than accurate.

*/ Appellees' brief is designated herein as "DB." Appel-
lant's principal brief is designated "PB."

As demonstrated in our principal brief, this case is an extremely important one. The answers to the questions that were presented to the court below could have lasting impact on numerous authors across the country, as well as on the motion picture and television industries. Matters of such significance must not be summarily resolved, particularly not where, as here, there are numerous issues of material fact -- genuine issues of substantial public interest, as well as issues surrounding the creation of the private contractual relationship in question -- that must be tried before a just resolution of the controversy is possible.

II. ARGUMENT

A. Appellees persist in avoiding the central issue in this case -- namely, what did the parties to the Landon-Fox agreement intend by their use of the term "motion picture version"? Just as the court below did, appellees assume their own conclusion that "motion picture versions" subsumed the vehicle well-known in the trade at the time (and today) as a "television version" and expressly referred to by Fox -- in juxtaposition to "motion picture version" -- in numerous contracts presently before this Court. ^{*/}

^{*/} Appellees assume their own conclusion at the very outset (DB, p. 2) by stating the issue in terms of Fox's right to make "a series of motion picture films," rather than a series of television programs on film.

Ample evidence of appellees' effort to confuse this simple distinction is their continued reliance on language from cases, such as Wexley and Bartsch, which had absolutely nothing to do with the issue at bar, but which were concerned rather with the right to telecast a motion picture made for and previously exhibited to a theater audience.^{*/}

(See, e.g., DB, pp. 10, 21). Similarly, appellees' "sequel" argument -- relying on the Goodis case^{**/} (DB, p. 16) -- and their argument concerning clause (f), the television broadcasting clause of the Landon-Fox agreement, are not persuasive because both the sequel provision and the television broadcasting clause clearly relate back to the antecedent right granted to Fox by Mrs. Landon only to make "motion picture versions" of Mrs. Landon's literary property.

This deliberate avoidance of the factual distinction between "motion picture versions" and "television versions" which Fox itself has acknowledged on countless occasions illuminates the principal error of the district court's decision below. The distinction exists, in fact! And

^{*/} Wexley v. KTTV, Inc., 108 F. Supp. 558 (S.D. Cal. 1952), aff'd, 220 F.2d 438 (9th Cir. 1955); Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968), cert. denied, 393 U.S. 826.

^{**/} Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970).

neither the citation of cases dealing only with full-length motion pictures produced for theater audience consumption, nor repeated references to contractual provisions which refer only to such motion pictures can eliminate (or blur) that distinction.

Appellees cannot shut their own, or this Court's, eyes to the existence of "television versions." The "objective evidence" adduced by appellees to the contrary (DB, p. 6) simply misses the point. Appellees describe the method of prerecording each of the programs at issue; they refuse to recognize the separate and distinct art form created by the use of the prerecorded images. An ordinary television viewer of an episode of the series would not know or care whether the images he sees are live, on videotape or on film, but he certainly would know that he was viewing a television program. Authors, actors, agents, scriptwriters, critics (television, not motion picture), the Academy of Motion Picture Arts and Sciences, and the National Academy of Television Arts and Sciences all likewise would have no difficulty in identifying each episode of "Anna and the King" as a television program. When, for example, would a theatrical motion picture employ dubbed audience laughter?

Appellees follow the court below in failing to distinguish between an ambiguity (which we say does not exist) and a term with a technical connotation which may be different from colloquial interpretation. Mrs. Landon and Fox knew very well what "motion picture versions" meant at the time of their agreement. Fox is now trying to cloud the issue by giving the technical term a different meaning from what was intended by the parties. There were two different industries, two different markets, two different art forms -- the only thing in common is that some television programs can be prerecorded on motion picture film. Whether such prerecording of the pilot and twelve other episodes of the "Anna and the King" series constituted "motion picture versions" under the 1944 agreement should not be resolved by summary judgment. Since even the existence or nonexistence of the distinction between "motion picture versions" and "television versions" is the subject of sharply conflicting evidence of record, a trial is necessary. ^{*/}

^{*/} Indeed, on this fundamental issue Mrs. Landon asks the same opportunity to establish trade custom or usage at a trial as was accorded to the plaintiff in Hollywood Plays, Inc. v. Columbia Pictures Corporation, 77 N.Y.S.2d 568 (Sup. Ct. N.Y. Co. 1974), aff'd, 274 App. Div. 912 (1st Dep't), rev'd on other grounds, 299 N.Y. 61 (1949) (DB, pp. 21, 35-6). The principal issue in Hollywood Plays was whether an enforceable contract between the plaintiff and the defendant ever came into existence. The court was

B. For reasons discussed and authority cited in our principal brief (PB, pp. 52-4), Mrs. Landon did not have the burden of specifying with particularity the rights she reserved to herself. Nonetheless, the language of the agreement in question is sufficiently precise to indicate that Mrs. Landon indeed reserved more to herself than appellees are willing to admit. Appellees gloss over and mischaracterize the reference in the television broadcasting clause of the Landon-Fox agreement to Mrs. Landon's "reserved

[Footnote cont'd]

required to construe terms used in two telegrams ("world picture rights" and "world motion picture rights") which related back to an oral offer to purchase the motion picture, television and radio rights to plaintiff's play. The court held that, in light of the custom and usage in the industry at the time, the terms in question did also embrace television and radio rights (but see Judge Peck's dissent, 83 N.Y.S.2d at 303-04), and therefore an enforceable agreement had been consummated.

However, Hollywood Plays does not, as suggested by appellees, dispose of the factual issues in the present case. Here we are faced with an interpretation of the technical terms of a definitized contract. We do not deny that Fox received some television broadcasting rights. Where the disagreement exists in this case is the precise nature and scope of the television broadcasting rights conveyed to Fox and that issue was never even addressed, let alone resolved, by the Hollywood Plays court. For all we know, that court was only considering the same issue as later arose in Bartsch, supra, i.e., whether a theatrical motion picture could later be televised. Accordingly, in the instant case, evidence at trial of custom and usage will not show whether or not Fox received television broadcasting rights, but rather whether the language of the Fox-Landon agreement conveying such rights covered the right to produce a television series.

rights to broadcast the literary property by television from living actors, or otherwise." Indeed, appellees' strained grammatical construction of the clause late in their brief (DB, p. 39) suggests they appreciate their vulnerability on this point.

Appellees urge the Court to read the reference to reserved television rights as though it referred to broadcasts "from living actors by television or otherwise." But that is simply not what the clause says. As noted above, it says "by television from living actors, or otherwise." Thus, the clause clearly acknowledges a reservation broader than merely the right to produce live television programs. Moreover, the difference between the language that appears in the contract and what appellees urge was not an inadvertent slip of the drafter's (Fox) pen. The same phraseology appears in numerous Fox contracts pre- and post-dating Mrs. Landon's contract. (Attachment E, e.g., JA 156, 164-5, 168).

C. Appellees' "deadlock" arguments (DB, pp. 22-3) are equally unmeritorious.

1. The first "deadlock" argument proceeds from the erroneous premise that Mrs. Landon could not make or authorize a television series without possessing motion picture

rights or sound rights. However, all she would need in this regard is the right to make or authorize "television versions," which is precisely the right she retained. Furthermore, contrary to appellees' assertion, Mrs. Landon did not convey all her sound rights under Article 1(b) of the agreement, but only those sound rights relating to "motion picture versions."

This argument by appellees underscores their circular reasoning. Their position that Mrs. Landon could not make television versions by any process (including motion picture film) assumes, once again, their conclusion that "television versions" and "motion picture versions" are synonymous. Yet, we are prepared to prove that it was in 1944, and is today, trade practice for an author to grant television serial rights, or the right to make "television versions," separately from the right to make "motion picture versions."

Appellees claim that Article 1(b) gave them "the exclusive right to make sound recordings of the story on records, films or other devices." This is not correct. The right to make sound recordings was related to the production of motion pictures. This is made crystal clear

by comparing Mrs. Landon's sound recording clause with that of the other contracts which mention "television versions" along with "motion picture versions" in clause 1(c). In the "television versions" contracts, the sound recording clause refers not only to motion pictures but also to "and/or television productions." (See PB, p. 47, n. 17).

Appellees' interpretation forces the absurd result, among other things, of preventing the production of videotaped programs by anyone. Under the Fox-CBS agreement for the television series in issue, CBS could have called for the programs to have been made on videotape, as have been many television series. If appellees' argument is taken seriously, then Fox would not have had the authority to make television programs on videotape, because they are not "motion pictures" as appellees define the term; and Mrs. Landon would not be able to make television programs because, according to appellees' theory, she would not have the sound recording rights.

2. Appellees also describe as a "deadlock" Mrs. Landon's agreement with Rodgers and Hammerstein ("R and H") not to exercise her television rights without their permission

and cite that agreement as a bar to the present action (DB, p. 23, n.). This position is wholly devoid of merit.

Mrs. Landon's restriction as to the exercise of the television rights which she reserved to herself under her agreement with Fox in no way limits her right to prosecute others, such as Fox and CBS, for infringing her copyright. Moreover, we know of no principle of law that would so much as suggest that, absent explicit language, a limitation in a subsequent agreement can operate to create rights in an earlier agreement between different parties. Nothing in the R and H agreement designates Fox as a third-party beneficiary in this respect. Indeed, R and H's attorney strenuously objected to Fox's planned production of the television series "Anna and the King" when he learned of it. (Attachment K, JA 447).

To the extent that she may have needed it, Mrs. Landon has, in fact, received authorization from Rodgers and Hammerstein to pursue the immediate action and indeed to retain any damages she collects as a result of the action (Attachment L, JA 448-9). Thus, even if the R and H agreement worked in the strange way suggested by appellees (which it could not), Mrs. Landon would still not be barred in any

way from bringing this suit. As the protest by R and H to Fox and the authorization from R and H to Mrs. Landon might suggest, Mrs. Landon may very well have a duty, under her R and H agreement, to institute actions, as the lawful copyrightholder of such television rights, to prevent a dilution of the conveyance to R and H (see also PB, pp. 55-6).

D. Appellees' response (DB, pp. 34-9), to our contentions about Fox's contracting practice confirms the need for a trial of that issue of fact. If Fox's statement is correct that the two contracts we cited as having apparently been drafted in the East were actually drafted in the West and sent to the East for execution, then we have an interesting situation. If these two contracts are added to the six we cited as having been executed by the authors in the East, there are at least eight contracts during the period in question which were executed in the East by the respective authors. This would seem to confirm our first hypothesis (PB, p. 66), curiously avoided by appellees in their brief, that contracts for the acquisition of television rights in addition to motion picture rights were channeled primarily through the West Coast legal department. Mrs. Landon's, of course, was among those that were not.

Appellees make no effort to explain the so-called difference in drafting style. Indeed, they do not contradict our analysis of the two sets of contracts, in which we point out that the key grant clauses are all identical, except for addition of the term "television versions" to those contracts in which the right to make such versions, as opposed to only "motion picture versions," were granted to Fox.

E. In summary, on the record presently before the Court, this case presents a multitude of genuine issues of material fact which can be resolved only by a trial on the merits. Among the more serious factual controversies presented by the record are the following:

1. What was Mrs. Landon's intention and her understanding of Fox's intention in 1944? (McIntyre and Strauss versus Mrs. Landon and Taylor) ^{*/}

2. Was Fox aware of Margaret Landon's intention in 1944?

^{*/} While appellees contend that any factual disputes between Mrs. Landon and Helen Strauss "are completely irrelevant to any triable issue of material fact" (DB, p. 33), the court below cited Miss Strauss' statements as one of the bases for his holding as to the intent of the parties. And, of course, appellees adduced Miss Strauss' counter-affidavit to create the issues of fact that they now claim is irrelevant.

3. Who was responsible for Mrs. Landon's negotiations with Fox?

4. What was Fox's intention in 1944?

5. What was the meaning in 1944, according to industry custom and usage, of the terms "motion picture versions" and "television versions"? ^{*/}

6. What were Fox's contracting practices during the relevant period relating to the purchase of motion picture and television rights? Specifically, did Fox's East and West Coast legal departments actually use different styles and/or formats, and if so, was there any significance to their doing so?

7. What is the credibility of Strauss, McIntyre and Ferguson, as opposed to Mrs. Landon and Taylor?

^{*/} As put by the Court in Walls v. Bailey, 49 N.Y. 464 (1872), a case which is misapplied by appellees (DB, p. 27):

"It is for the jury then, under proper instructions from the court, to take all the evidence in the case; that as to the existence, duration and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties; and therefrom to determine whether there is shown a custom of such age and character, as that the presumption of law will arise, that the parties knew of, and contracted in reference to it, or whether the usage is so local and particular, as that knowledge in the party to be charged, must be shown affirmatively or may be negated." (p. 447).

8. What was the trade meaning and significance of the living actors reservation with respect to television?

9. What are "customary motion picture rights"?

10. What did the parties intend by "motion picture versions;" "from living actors, or otherwise;" and "sequels" in connection with the production of motion picture versions?

11. Did production of the television series "Anna and the King" fall within the definition of "motion picture versions" in the 1944 agreement?

12. What did Fox receive by way of television rights in contracts which conveyed the right to make "television versions" in addition to "motion picture versions"?

With respect to the antitrust count of the Complaint, the following issues of fact are presented:

1. What was Fox's economic position in the marketplace for motion picture rights in books?

2. What were the relative bargaining positions of the parties?

3. Would any protest or attempt to eliminate the 1944 renewal assignment provision have been futile or hazardous to Mrs. Landon?

4. What were Fox's practices in demanding the transfer of renewal copyright rights in transactions for rights under original copyrights, and what were the practices of other motion picture companies in such transactions? Did such practices constitute "oppressive circumstances" which rendered the renewal assignment unenforceable?

5. Was there a "not insubstantial amount of interstate commerce" involved in Fox's contracts with other authors?

6. Were original copyrights and renewal copyrights, as well as particular rights thereunder, treated as separate products at the time of the Landon-Fox agreement?

7. Did any of the money received by Mrs. Landon under the 1944 agreement represent consideration for the renewal rights? If so, was it inadequate?

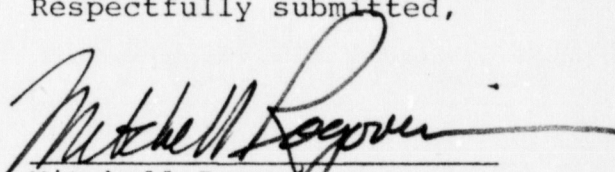
8. To what extent, if any, could Mrs. Landon have proved ascertainable damages prior to inception of the renewal term?

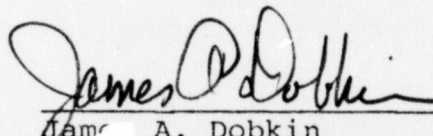
III. CONCLUSION

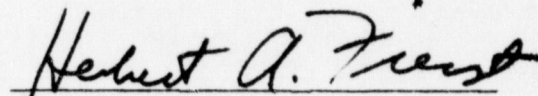
For the foregoing reasons and those set forth in our principal Brief and the briefs of the Amicus Curiae (including

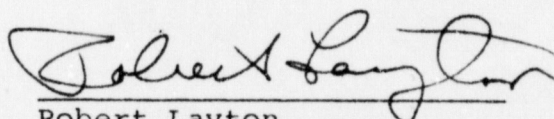
its Reply Brief which we incorporate herein by reference), we respectfully request this Court to reverse the district court and remand the case for a trial on the merits.

Respectfully submitted,


Mitchell Rogovin


James A. Dobkin
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
(202) 872-6700


Herbert A. Fierst
607 Ring Building
Washington, D. C. 20036
(202) 331-8174


Robert Layton
LAYTON & SHERMAN
50 Rockefeller Plaza
New York, New York 10020
(212) 586-4300

Attorneys for Appellant

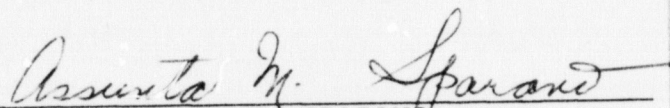
Dated: March 7, 1975

AFFIDAVIT OF SERVICE

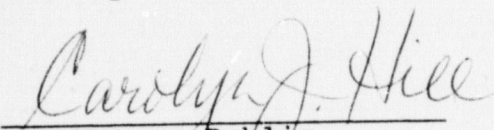
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ASSUNTA M. SPARANO, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in Brooklyn, New York; that on the 6th day of March, 1975, deponent served the within Appellant's Reply Brief upon Rogers & Wells, Attorneys for Defendants-Appellees, 200 Park Avenue, New York, N. Y. 10017, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.


ASSUNTA M. SPARANO

Sworn to before me this
6th day of March, 1975.


Notary Public

CAROLYN J. HILL
Notary Public, State of New York
No. 31-6897070
Qualified in New York County
Commission Expires March 30, 1976

